

**FEDERAL ELECTION COMMISSION**

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**FIRST GENERAL COUNSEL'S REPORT**

**CELA**

MUR: 6280

DATE COMPLAINT FILED: April 23, 2010

DATE OF NOTIFICATION: April 30, 2010

DATE LAST RESPONSE RECEIVED: June 21, 2010

DATE ACTIVATED: July 20, 2010

SOL: January 14, 2015

COMPLAINANT:

Voters FIRST Act for Congress

RESPONDENTS:

Representative Howard L. Berman

Berman for Congress and Bruce Corwin, in his official  
capacity as Treasurer

Michael Berman

Yes on FAIR and Frederic D. Woocher, in his official  
capacity as Treasurer

Daniel Lowenstein

RELEVANT STATUTES:

2 U.S.C. § 441i(e)(1)(A)

2 U.S.C. § 441i(e)(1)(B)

2 U.S.C. § 431

11 C.F.R. § 300.61

11 C.F.R. § 300.62

11 C.F.R. § 300.2(c)(2)

INTERNAL REPORTS CHECKED: None

FEDERAL AGENCIES CHECKED: None

**I. INTRODUCTION**

This matter involves allegations that Representative Howard L. Berman ("Representative Berman"), Berman for Congress and Bruce Corwin, in his official capacity as Treasurer ("Berman for Congress"), Michael Berman, Yes on FAIR and Frederic D. Woocher, in his

1 official capacity as Treasurer ("Yes on FAIR"), and Daniel Lowenstein violated the Federal  
2 Election Campaign Act of 1971, as amended (the "Act"), in connection with their support of a  
3 California ballot initiative.

4 As discussed below, we recommend that the Commission find no reason to believe that  
5 the Respondents solicited, received, directed, transferred, or spent funds in violation of 2 U.S.C.  
6 § 441i(e)(1)(A) and (B), and that the Commission close the file.

7 **II. FACTUAL AND LEGAL ANALYSIS**

8  
9 **A. Factual Background**

10 Representative Berman is a Federal officeholder, as well as a candidate for reelection, in  
11 the November 2, 2010, general election. See 2 U.S.C. §§ 431(2), 431(3); 11 C.F.R. §§ 100.3,  
12 100.4. Berman for Congress is his principal campaign committee.

13  
14 Yes on FAIR<sup>1</sup> is a ballot initiative committee in California that has applied to the Internal  
15 Revenue Service for recognition as a section 501(c) organization. Daniel Lowenstein is listed as  
16 a principal officer of Yes on FAIR. Michael Berman, Representative Berman's brother, is a  
17 consultant to Yes on FAIR. Yes on FAIR's sole purpose is to support the qualification and  
18 passage of the Financial Accountability In Redistricting Act (the "FAIR Act") in the November  
19 general election. The FAIR Act<sup>2</sup> qualified for the general election ballot as of June 24, 2010.  
20 See <http://www.sos.ca.gov/elections/ballot-measures/qualified-ballot-measures.htm#1451> (last  
21 visited September 9, 2010). Both before and after the FAIR Act qualified for the ballot, Yes on  
22 FAIR accepted contributions in excess of \$5,000. See [<sup>1</sup> The respondent's full name is "Yes on FAIR; a coalition of entrepreneurs, working people, community leaders such as Karen Bass, and other concerned citizens devoted to eliminating bureaucratic waste of taxpayer dollars on the political game of redistricting." See Lowenstein, Woocher, and Michael Berman Response, 2. Karen Bass is a California state legislator; she was Speaker of the California State Assembly until March 1, 2010, and remains a member of the State Assembly. Bass is also the current Democratic nominee for election to the U.S. House of Representatives in the 33rd Congressional District of California. She is not a respondent in this matter.](http://cal-</a></p></div><div data-bbox=)

<sup>2</sup> The FAIR Act has been designated "Proposition 27" on the general election ballot.

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1 access.ss.ca.gov/Campaign/Committees/Detail.aspx?id=1323672&view=late1 (last visited  
2 September 1, 2010).

3 Voters FIRST Act for Congress is the Complainant in this matter, as well as the name of  
4 the ballot initiative championed by the Complainant. Like the FAIR Act, it pertains to  
5 redistricting. It qualified for the November general election ballot as of May 5, 2010, and has  
6 been designated "Proposition 20." See [http://www.sos.ca.gov/elections/ballot-](http://www.sos.ca.gov/elections/ballot-measures/qualified-ballot-measures.htm)  
7 [measures/qualified-ballot-measures.htm](http://www.sos.ca.gov/elections/ballot-measures/qualified-ballot-measures.htm) (last visited September 9, 2010).

8 The Complaint alleges that Representative Berman took actions to "establish, finance,  
9 maintain or control" Yes on FAIR, which resulted in a violation of 2 U.S.C. § 441i(e)(1)(A) and  
10 (B).<sup>3</sup> The Complaint is based on two factual allegations. First, in a report published on January  
11 18, 2010, Lowenstein acknowledged that Representative Berman and Michael Berman, a  
12 redistricting expert, are "the real sponsors" of the FAIR Act. See Compl., Attachment C.  
13 Notably, the report discusses the ballot initiative but does not mention Yes on FAIR or suggest  
14 that the Bermans are involved with that entity—a distinction not recognized in the Complaint.  
15 Second, the Complaint alleges that a conversation between Charles T. Munger, Jr. (an individual  
16 involved in some capacity with the Complainant) and Representative Berman on March 5, 2010,  
17 indicated that Representative Berman controlled Yes on FAIR. Specifically, the Complaint  
18 states that Munger and Representative Berman discussed a potential compromise wherein  
19 Munger would agree not to file the necessary signatures to qualify the Voters FIRST Act for  
20 Congress for the November ballot, "while the campaign to gather signatures for the FAIR  
21 measure would cease." *Id.* at 2.

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<sup>3</sup> Though they were not specifically named as respondents in the Complaint, the Commission sent notifications to Berman for Congress, Michael Berman, Lowenstein, and Yes on FAIR.

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1 On April 7, 2010, Yes on FAIR sought an advisory opinion as to whether Members of  
2 Congress may solicit funds on its behalf outside of the amount limitations and source  
3 prohibitions of the Act both before and after the FAIR Act qualified for the general election  
4 ballot. The advisory opinion request was complete on April 15, 2010. As part of its request, Yes  
5 on FAIR represented to the Commission that it is not directly or indirectly established, financed,  
6 maintained or controlled by, or acting on behalf of, any Federal candidate or officeholder.  
7 Because the Commission relied on that representation in Advisory Opinion 2010-07 (Yes on  
8 FAIR), issued on June 14, 2010, there was no basis for it to address the question of whether  
9 Representative Berman established, financed, maintained or controlled Yes on FAIR. Within a  
10 week after issuing Advisory Opinion 2010-07 (Yes on FAIR), the Commission received two  
11 responses to the Complaint.

12 The first response, sent on behalf of Representative Berman and Berman for Congress  
13 (the "Rep. Berman Response"), asserts that those respondents have not "established, financed,  
14 maintained or controlled" Yes on FAIR. The Rep. Berman Response asserts that though  
15 Representative Berman is "a private supporter" of the FAIR Act, he does not "hold himself out  
16 as responsible for Yes on FAIR's activities, or as specially involved in its decisionmaking."

17 With respect to the March 5, 2010, phone conversation between Representative Berman and  
18 Manger, Representative Berman "does not share the Complainant's recollection of the  
19 conversation" and asserts that even if Complainant's recollection were accurate, it is not  
20 evidence of any special relationship between Representative Berman and Yes on FAIR. *Id.* at 3.  
21 Rep. Berman Resp., 2: The Rep. Berman Response acknowledges that the Committee has made  
22 one contribution of \$10,000 to Yes on FAIR, but it maintains that neither the Committee, nor  
23 Representative Berman, has paid for Yes on FAIR's administrative costs or provided any

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1 ongoing funding to Yes on FAIR. Additionally, the Rep. Berman Response maintains that  
2 although Representative Berman is aware of Michael Berman's involvement with Yes on FAIR,  
3 Michael Berman has no actual authority to act on Representative Berman's behalf, and his  
4 actions in connection with Yes on FAIR have not been made under Representative Berman's  
5 direction or control. *Id.* at 4.

6 The second response was sent on behalf of Yes on FAIR officers and consultants  
7 Lowenstein, Wocher<sup>4</sup> and Michael Berman (the "LWB Response"). It contains as an initial  
8 matter that the Complaint fails to allege a violation with respect to these respondents. In any  
9 event, the LWB Response further asserts that Lowenstein "worked with a team of experts to draft  
10 the FAIR Act" and is the official proponent of the measure, and that he and Wocher are the  
11 only officers and directors of Yes on FAIR and are responsible for all of its decisions. LWB  
12 Resp., 2-3. The LWB Response further asserts that no Federal officeholder or candidate "has  
13 ever played any role in the establishment, governance, or general operation of Yes on FAIR." *Id.*  
14 at 3. Michael Berman, according to the LWB Response, was hired as a consultant to Yes on  
15 FAIR but does not have any control over the entity. *Id.* Moreover, the LWB Response asserts  
16 that to the extent Michael Berman is involved with Yes on FAIR, his actions cannot be imputed  
17 to Representative Berman, because a familial relationship, without more, is insufficient to  
18 establish agency. *Id.* at 5.

19 **B. Analysis**

20 Under the Act, as amended by the Bipartisan Campaign Reform Act of 2002 ("BCRA"),  
21 Federal candidates, officeholders, their agents, and entities directly or indirectly established,

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<sup>4</sup> Wocher was named in the Commission's notification letter as a respondent in his official capacity as Treasurer of Yes on FAIR, though not as an individual. Neither of the responses was submitted on behalf of Yes on FAIR.

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1 financed, maintained or controlled by, or acting on behalf of, a candidate or officeholder, may  
2 not raise or spend funds in connection with an election<sup>5</sup> unless the funds are subject to the  
3 limitations, prohibitions, and reporting requirements of the Act. *See* 2 U.S.C. § 441i(e)(1); *see*  
4 *also* 11 C.F.R. §§ 300.61, 300.62.

5 With respect to this matter, the Commission has already issued Advisory Opinion 2010-  
6 07 (Yes on FAIR), which determined that Members of Congress could solicit funds outside the  
7 amount limitations and source prohibitions of the Act and Commission regulations on behalf of  
8 Yes on FAIR during the period before the initiative qualified for the November ballot, and up to  
9 \$20,000 from individuals on behalf of Yes on FAIR after the initiative qualified to be placed on  
10 the ballot. The Commission's conclusion, however, relied on Yes on FAIR's assertion that it is  
11 not "established, financed, maintained or controlled" by a Federal candidate, officeholder, or  
12 agent of either. Therefore, if Yes on FAIR is "established, financed, maintained or controlled"  
13 by a Federal candidate, officeholder, or agent of either, it cannot rely on Advisory Opinion 2010-  
14 07 (Yes on FAIR). Thus, the primary issue in this matter is whether Representative Berman  
15 directly or indirectly "established, financed, maintained or controlled" Yes on FAIR.

16 The ten non-exclusive factors set out at 11 C.F.R. § 300.2(c)(2) determine whether a  
17 person or entity ("sponsor") "directly or indirectly established, financed, maintained or  
18 controlled" another person or entity under 2 U.S.C. § 441i(e)(1). These factors must be  
19 examined in the context of the overall relationship between the sponsor and the entity to  
20 determine whether the presence of any factor or factors is evidence that the sponsor "directly or  
21 indirectly established, financed, maintained or controlled" the entity. 11 C.F.R. § 300.2(c)(2).

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<sup>5</sup> The Commission has addressed whether activities of a ballot measure committee established, financed, maintained or controlled by a Federal candidate, officeholder, or agent of either, are in connection with an election. *See generally* Advisory Opinions 2010-07 (Yes on FAIR); 2007-28 (McCarthy/Nunes); 2005-10 (Berman/Doolittle); 2003-12 (Flake).

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As applied to Yes on FAIR and Representative Berman, the relevant factors are:

- Whether Representative Berman, directly or through his agent, has the authority or ability to direct or participate in the governance of Yes on FAIR through provisions of constitutions, bylaws, contracts, or other rules, or through formal or informal practices or procedures, 11 C.F.R. § 300.2(c)(2)(ii);
- Whether Representative Berman, directly or through his agent, has the authority or ability to hire, appoint, demote, or otherwise control the officers, or other decision-making employees or members of Yes on FAIR, 11 C.F.R. § 300.2(c)(2)(iii);
- Whether Representative Berman, directly or through his agent, provides funds or goods in a significant amount or on an ongoing basis to Yes on FAIR, such as through direct or indirect payments for administrative, fundraising, or other costs, but not including the transfer to a committee of its allocated share of proceeds jointly raised pursuant to 11 C.F.R. § 102.17, and otherwise lawfully, 11 C.F.R. § 300.2(c)(2)(vii); and
- Whether Representative Berman, directly or through his agent, had an active or significant role in the formation of Yes on FAIR, 11 C.F.R. § 300.2(c)(2)(xi).

The Commission has concluded that a candidate "established" an entity for purposes of 11 C.F.R. § 300.2(c)(2) on the basis that the candidate was among the individuals who formed the committee and signed its organizational documents, he served as its chairman, and his part-time campaign consultant aided the committee with its state filings and bank accounts. See Advisory Opinion 2003-12 (Flake); see also MUR 5367 (Issa) (wherein candidate who provided committee with more than 60% of funding and all of seed money was determined to have "financed" the committee). In contrast, Representative Berman is not listed as an officer on Yes on FAIR's Statement of Organization, and the available information does not indicate that he had any official role in establishing Yes on FAIR. Further, while Berman for Congress acknowledges donating \$10,000 to Yes on FAIR, that amount represents less than one half of one percent of even those contributions that are listed in the Complaint (which total \$2,385,000). No available information indicates that Representative Berman or Berman for Congress provided

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1 financing for Yes on FAIR beyond the \$10,000 contribution. Moreover, there is no information  
2 available that refutes the assertion in the Rep. Berman Response that neither Berman for  
3 Congress nor Representative Berman paid for Yes on FAIR's administrative costs or provided  
4 any funding in a significant amount or on an ongoing basis. There is similarly no indication that  
5 Representative Berman had the authority or ability to hire, appoint, demote, or otherwise control  
6 the officers, or other decision-making employees or members of Yes on FAIR.

7 Additionally, the Commission concluded in MUR 5338 (The Leadership Forum) that  
8 because no formal authority was granted in the organizational documents of a 527 political  
9 organization, there was no formal "control" of the organization by the alleged sponsors. The  
10 Commission also found that "more than the mere fact of such informal, ongoing relationships  
11 between the personnel of the potentially sponsoring and potentially sponsored entity is necessary  
12 to support a conclusion of 'establishment, financing, maintenance or control'" of the 527  
13 organization. "[W]hile former employers and colleagues may exercise influence, influence is not  
14 necessarily control." See MUR 5338 (The Leadership Forum), First General Counsel's Report  
15 (adopted by the Commission by a vote of 4-2).

16 Here, Complainant alleges that the phone conversation between Munger and  
17 Representative Berman demonstrated Representative Berman's control of Yes on FAIR (an  
18 account which the respondents dispute). However, Complainant again does not distinguish  
19 between the FAIR Act and Yes on FAIR, alleging only that Representative Berman discussed a  
20 "possible legislative solution" in which "the campaign to gather signatures for the FAIR measure  
21 would cease...." Compl., 2. Complainant's characterization of the phone conversation does not  
22 demonstrate that Representative Berman controlled Yes on FAIR.

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1 In this matter, the available information does not indicate that Representative Berman or  
2 Berman for Congress has any formal authority over Yes on FAIR, nor does it indicate a  
3 relationship of control, as opposed to one of mere influence. Rather, it indicates only that  
4 Representative Berman is a proponent of the FAIR Act, was involved in some fashion with Yes  
5 on FAIR's campaign to gather signatures for its ballot qualification, and is the brother of one of  
6 Yes on FAIR's consultants. In light of the available information and relevant precedent, the  
7 Commission lacks a sufficient basis to find that Representative Berman "directly or indirectly  
8 established, financed, maintained or controlled" Yes on FAIR.

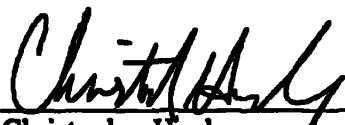
9 Accordingly, we recommend that the Commission find no reason to believe  
10 Representative Howard L. Berman, Berman for Congress and Bruce Corwin, in his official  
11 capacity as Treasurer, Michael Berman, Yes on FAIR and Frederic D. Woocher, in his official  
12 capacity as Treasurer, and Daniel Lowenstein violated 2 U.S.C. § 441i(e)(1)(A) and (B).


13 **III. RECOMMENDATIONS**

- 14 1. Find no reason to believe that Representative Howard L. Berman, Berman for  
15 Congress and Bruce Corwin, in his official capacity as Treasurer, Michael Berman,  
16 Yes on FAIR and Frederic D. Woocher, in his official capacity as Treasurer, and  
17 Daniel Lowenstein violated 2 U.S.C. § 441i(e)(1)(A) and (B).  
18  
19 2. Approve the attached Factual and Legal Analyses.  
20  
21 3. Approve the appropriate letters.  
22  
23 4. Close the file.

24 Date: 10-18-2010

By:

  
Christopher Hughey  
Acting General Counsel

  
Kathleen Guith  
Acting Associate General Counsel



Mark Shonkwiler  
Assistant General Counsel



Peter Reynolds  
Attorney

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